

July 3, 2018

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VIA EMAIL BEFORE 5:00 P.M.

Mr. Denny Doyle, Mayor
City of Beaverton City Council
12725 SW Millikan Way
Beaverton, OR 97076

**RE: Applicant's Second Open Record Period Response; City of Beaverton File
Nos. DI2017-0003, APP 2018-0002 (Oregon Beverage Recycling Cooperative)**

Dear Mayor Doyle and Members of the City Council:

This office represents Oregon Beverage Recycling Cooperative ("OBRC"). This letter is timely submitted on Tuesday, July 3, 2018 before 5:00 p.m. While this letter contains both argument and evidence as those terms are defined in ORS 197.763(9)(a) and (b), this letter focuses on responding to issues and evidence raised by Appellants in their respective second open record period letters. As we stated in our letter dated June 26, 2018, the Applicant will reserve the majority of its legal argument without new evidence for its final written argument.

On June 26, 2018, appellants, Brendan and Holli Bridgens and their family, Michael Matschiner, Joseph Conrad, Trisha McPharren and her family, Jesuit High School, Rick Skayhan and his family, and Glenwood 2006, LLC (collectively, the "Appellants") submitted arguments and new evidence as part of the first open record period in the above referenced case.

Appellants' arguments generally focus on the perceived external impacts of the Redemption Center and whether OBRC adequately responded to neighborhood concerns. Below is a summary of each of the Appellants' arguments contained in their submittals, together with our responses to each argument raised. However, OBRC iterates that it has responded to neighborhood concerns and has offered mitigation measures to ensure that it is a good neighbor. These were detailed in OBRC's letter for the first open record period and include the following proposed mitigation measures:

"A. Construction of an appropriately high solid fence with gates around the dumpsters;

B. Construction of a six-foot high solid wooden fence along OBRC's east property line from a point adjacent to Beaverton-Hillsdale Highway (consistent with a sight distance analysis) to its property line on Club Meadow Lane (to add a barrier for the single family dwelling).

C. *Blocking the stairway between the Glenwood 2006 property and the OBRC property at a location reflecting the property line. OBRC will cooperate with Glenwood 2006, to the extent that Glenwood 2006 is willing to do so, on the location and materials for blocking the stairway (to discourage parking on the Glenwood 2006 property).*

D. *Installation of a sound-proof insulated loading dock door. The insulated loading dock door will further reduce the minimal odor and noise sporadically emitted from the "backroom operations" when trucks arrive for loading of redeemed beverage containers.*

E. *Installation of a sign at the pedestrian access to the OBRC facility stating, "Please be respectful of our neighbors by not talking loudly, loitering or smoking on this property."*

F. *Installation of a six-foot solid fence on the south and west side of the BottleDrop window.*

G. *Signing "Employee Only" parking for the parking spaces on the OBRC property east property line adjacent to the single family dwelling.*

H. *Requiring approval of a "Good Neighbor Agreement" between the City and OBRC that includes the following elements:*

1. *OBRC's obligation to comply with applicable City noise, odor, hours of operation and truck access requirements now or in future effective versions of the Beaverton Municipal Code. Note: Some testimony indicated that OBRC trucks arrived before 7:00 a.m. OBRC has investigated this testimony and determined that the testimony was accurate. OBRC has instructed its trucks not to arrive before 7:00 a.m.*

2. *A commitment to appear at homeowners associations and recognized neighborhood association meetings when requested to address questions or concerns about operation of the OBRC facility.*

3. *Production of an annual report to the Beaverton Planning Department containing a log of any complaints received and how those complaints were addressed.*

4. *Publication of a contact person with an email address for persons to submit complaints or questions about the operation of the OBRC facility and a commitment to respond within 72 hours to the complaint, if at all possible.*

5. *Implementation of OBRC's trespass policy.*

6. *Agreement to cooperate with the City, recognized neighborhood associations and homeowners associations on any City plans to address larger societal issues associated with homelessness and nuisance activities.*

7. *Agreement to cooperate with Jesuit High School on security issues concerning Jesuit High School's property.*

Further, OBRC will add additional staff to ensure faster customer service and to patrol the OBRC property for litter."

After reviewing Appellants' arguments and testimony contained in the first open record period submittal, OBRC has decided to include two additional elements as part of the proposed "Good Neighbor Agreement":

1. Agreement to provide professional security during the OBRC's operating hours, seven days a week.

2. Agreement to construct an "air knife" at the entrance to the OBRC facility, which is the most effective way to prevent odors from escaping from the facility.

As explained below, the Council has the authority to impose these as conditions of approval on this Director's Interpretation and OBRC would support these conditions.

RESPONSE TO APPELLANTS' ARGUMENTS OFFERED DURING THE FIRST OPEN RECORD PERIOD

1. Response to arguments raised by Glenwood 2006, LLC.

Glenwood 2006, LLC ("Glenwood") raised a number of arguments through its attorney, Mr. E. Michael Connors, in a letter dated June 26, 2018. Glenwood's arguments are summarized below and each is followed by OBRC's response.

- a. **"The legislative history of the 2011 Oregon Bottle Bill demonstrates that the legislature rejected a proposal to treat BCRCs as commercial uses and site them in commercial zones."**

RESPONSE: Glenwood 2006 argues that because language in the original pilot project bill that would have required local governments to allow the redemption centers in commercial zones did not make it into the final program approved in 2015, the legislature did not intend for the redemption centers to be commercial uses. In so doing, Glenwood offers no evidence that this provision was discussed or any explanation of why it was removed. Certainly, if this legal requirement were still in place, a Directors Interpretation might not have been necessary. Thus, the most plausible reason for the legislature not retaining that provision in the final legislation is

that it simply did not wish to preempt local government decisions regarding their own land use regulations. It does not mean that they Redemption Centers are not commercial uses.

More importantly, though, is that no matter how one views the legislative history, it is clear that the legislature did not view redemption centers as industrial uses and also did not view them as “recycling centers.” What the legislature clearly did want, as explained in OBRC’s initial appeal response, was for the redemption centers to be located in convenient locations near beverage retailers, which supports OBRC’s position that the CS zone is entirely appropriate for a redemption center.

b. “Even if the City Council wants to allow BCRCs in commercial zones, it should require a conditional use permit.”

RESPONSE: BDC 10.50 provides that a similar use authorization is used to determine whether a use is a “Permitted” use in a given zone “if the use is of the same general type and similar to the allowed uses.” Therefore, the Director’s Interpretation process is not intended to establish a new *conditional use* allowance, and such action would be inconsistent with LUBA’s direction that the Council determine whether the Redemption Center is a permitted use in the CS zone.

However, to the extent that the Council wishes to impose conditions on this Director’s Interpretation, it may do so pursuant to BDC 40.25.15.1.E and BDC 10.65(1). In fact, OBRC has proposed mitigation measures based on public testimony and private concerns and recommends that the City require these as conditions of approval. This includes a “Good Neighbor Agreement.” Thus, a separate conditional use process would yield little more than a fresh recitation of the same concerns and responses raised during this Appeal.

c. “OBRC attended NAC meetings after the City approved the BCRC and the meetings were designed to promote the BCRC not address neighborhood concerns.”

RESPONSE: Glenwood argues that City Planner Scott Whyte’s explanation at the NAC and CPO-3 meetings that the use was already permitted evidenced some sort of callousness of OBRC to neighborhood concerns and that its appearance at these meetings was for promotional purposes only. The Council can reject this argument for three reasons. First, Mr. Whyte was a City employee and his response to neighborhood concerns is irrelevant to the question of whether OBRC wished to hear and respond to such concerns. Second, substantial evidence submitted by OBRC during its first open record response demonstrates that it did then, and continues now, to follow up with neighborhood concerns. In fact, it was not required to attend the NAC meeting but did so in order to be a good neighbor. Third, most of the concerns raised during the March 9, 2017 meeting were raised by Glenwood itself.

d. “OBRC’s claim that it is willing to work with the neighborhood is disingenuous and inconsistent with OBRC’s actions.”

RESPONSE: OBRC offered a substantial amount of correspondence into the record in its first open record response, which demonstrates that it is responsive to neighborhood concerns, including emails between OBRC and the Bridgens family and Jesuit High School. OBRC also offered a substantial number of mitigation measures and a “Good Neighbor Agreement” in its first open record response, which is excerpted above.

As explained above, the Council has the authority to impose these measures as conditions of approval and OBRC would support such a decision.

e. “The Beaverton Police Department analysis and other evidence supports the neighborhood claims that the increase in criminal and security problems is a direct result of the BCRC.”

RESPONSE: Glenwood argues that the Police Department letter demonstrates that an increase in police calls are due to the Redemption Center. This point is contradicted by the very letter that Glenwood offers, which explains that the data yield no conclusion as to whether this increase in police activity was caused by the Redemption Center: “Without in-depth analysis of specific public demand requests for police services, I am unable to draw causal conclusions regarding the presence of the business located in question.” The letter goes on to explain that “in some cases above, the sample size of reported calls is very small and may contribute to significantly high percentage changes.” At bottom, the Police Department is unable to conclude that an increase in calls has been caused by the redemption center and that given the small number of calls in several categories, it does not claim that these increases are all statistically significant.¹

Further, OBRC submitted the information that the City Council had before it on the camping issue. The Police Report did not say that OBRC’s location was the cause of the increase. It is equally possible that the increase in homelessness and camping, especially given the nearby location of homeless camps to this area, is responsible for the increase, a possibility that Connors ignores. The fact is that no reasonable person can conclude that OBRC is responsible for problems affecting society in general, especially whereas here, the City Council is well aware of a camping problem that is likely the cause of the problems that Connors complains of.

¹ For example, the incidence of an “unwanted person” call went from six (6) between 5/15/16 and 3/15/17 to nine (9) between 5/15/17 and 3/15/18 within a ¼ mile radius. The incidence of a “disturbance” went from four (4) to five (5); “theft from vehicle” went from one (1) incidence to five (5) incidences; and “noise complaint” went from two (2) incidences to five (5) incidences, during the same period and within the same radius. However, several categories of calls saw no increase at all within the same ¼ mile radius. These include “behavioral health,” “vice-drugs,” “theft-shoplifting,” “littering,” and “prowler.” Finally, at least one category, “suspicious vehicle,” saw a substantial decrease.

f. “OBRC is violating the 7 am to 10 pm operating hours restrictions.”

RESPONSE: The Redemption Center’s normal operating hours are from 8:00 AM to 6:00 PM, and the Green Bag drop door is available between 7:00 AM and 10:00 PM. Outside of those hours, the public-facing portion of the facility is locked and inaccessible. And, as of the first open record period submittal date, there have been no official noise complaints of any kind submitted to the City. As for the testimony regarding trucks arriving at the OBRC facility prior to 7:00 AM, we note that trucks are generally free to move up and down Beaverton-Hillsdale Highway directly adjacent to the site at all hours of the day and night, and are likely far louder than a parked truck. Nevertheless, OBRC has instructed its pick-up service to ensure that trucks do not arrive before 7:00 AM and will continue to address any instance of an early pickup if they occur in the future. For these reasons, the Council can find that the Redemption Center operates within the allowable times permitted in the CS zone.

2. Response to arguments raised by Jesuit High School and certain individuals.

Jesuit High School and a number of individuals (together, “Jesuit”) raised a number of arguments through its attorney, Mr. Michael Neff, in a letter dated June 26, 2018. Jesuit’s arguments are summarized below and each is followed by OBRC’s response.

a. “The City Council should do a site visit to see the back area of the BCRC.”

RESPONSE: OBRC has provided a full description of its back-room operations, which includes the use of machines to sort and package the containers for delivery. OBRC has proposed installation of a new soundproof loading door that will prevent most sounds of this equipment from being audible outside the building. While OBRC is happy to host any City Councilor on a tour of the facility, a site visit this late in the process would further delay the Council’s decision on the Application. Therefore, OBRC does not believe that a quorum of Councilors should visit the facility before issuing a decision. And, any such visits would require new *ex-parte* declarations by the Councilors with an opportunity for appellant’s to raise objections, which would further delay the Council’s decision.

b. Pursuant to BDC 40.25, the public comment period should have occurred prior to OBRC opening for business.

RESPONSE: Appellants have attached copies of letters and emails that have already been submitted to the record and addressed by OBRC, so we do not re-address them in this letter. As to the thrust of Jesuit’s argument—that a public comment period should have been required before the Redemption Center opened—both City staff and the Applicant believed in good faith that the Redemption Center could be approved through a Type I Design Review and it was not until LUBA decided otherwise that there was any reason for either OBRC or the City to require a public approval process. At any rate, the Council can find that all Appellants have had an opportunity to be heard through this Appeal process.

c. Beaverton Municipal Code does not address BCRCs; thus, OBRC should have pursued a Director's Decision from the beginning.

RESPONSE: Because Senior Planner Scott Whyte scribbled "[t]he Beaverton Municipal Code does not address such facilities directly" on a Local Government Notification Form, Mr. Neff argues that a Director's Decision should have been sought from the beginning. Putting aside that such a writing on the form does not determine that a Director's Interpretation should be required, both City staff and the Applicant believed in good faith that the Redemption Center could be approved through a Type I Design Review and it was not until LUBA decided otherwise that there was any reason for either OBRC or the City to require a public approval process. As explained above, this Appeal process has given all Appellants ample opportunity to raise and explain their concerns.

d. City Council should conduct a site visit to determine if the backend operations at the Beaverton BCRC are similar to those at the BCRC Redmond and Bend locations.

RESPONSE: The Bend and Redmond locations are not subject of this appeal and the operations of different facilities in different cities have no relevance here.

e. There has been a significant increase in security and safety incidents in and around Jesuit High School since BCRC began operating in May of 2017.

RESPONSE: As the record demonstrates, at the beginning of 2018, OBRC attempted to meet with Jesuit High School to discuss ways in which it could address Jesuit's security concerns. Jesuit initially rebuffed OBRC's offer to meet. Eventually, Jesuit agreed to meet with OBRC to discuss ways in which OBRC might assist Jesuit employees with security. Despite its efforts, Jesuit has generally been uninterested in working with OBRC and has instead sought to shut the facility down. Even so, OBRC would still like to collaborate with Jesuit in creating the Good Neighbor Agreement discussed above.

f. To equate the BCRC to a recycling and redemption center at grocery stores is a false analogue because BCRCs are not accessory uses.

RESPONSE: Mr. Neff refers to an unrelated land use decision, CU2012-0002, which concerns the Beaverton Wal-Mart facility, to support his claim. That land use decision is not the subject of this appeal. Furthermore, regardless of whether the redemption use at a grocery store is a primary or accessory use, it is an allowed use. OBRC acknowledges that more bottles are processed at the BCRC location than traditional grocery store redemption facilities, but the fact remains: the bottle redemption use has always been part of the uses allowed in the CS zone.

- g. The noise, smell, trash, and safety issues are different and significantly more invasive than those caused by nearby fast food restaurants or other commercial uses.**

RESPONSE: In support of its assertion, Appellants include additional written testimony from Holli and Brandon Bridgens. OBRC has previously met with the Bridgens to address their concerns with noise, smell, and safety, as demonstrated by emails included as part of the record. OBRC and the Bridgens discussed fencing, parking relocation, and sound deafening in the BCRC. As mentioned above, OBRC is willing to provide these and other mitigation measures if the Council affirms the Director's Interpretation. Further, OBRC acknowledges it is bound by the noise and odor BDC provisions that apply in the CS zone.

- h. OBRC has not made effort to reach out to Richard Skayhan.**

RESPONSE: Prior to his declaration submitted as part of the first open record period, OBRC is unaware of any request made by Mr. Skayhan to meet with OBRC. Mr. Skayhan states that no request to meet with him has been made through his attorney, and that he has asked his attorney to advise him if such a request is made. Now that OBRC has been made aware that Mr. Skayhan would like to meet, it would be happy to meet with him to discuss any issues he may have.

3. Conclusion

For the above reasons, the Council can reject arguments raised by Appellants during the second open record period.

Sincerely,



Garrett H. Stephenson

GST:jmh

cc: Mr. John Andersen (*via email*)
Mr. Jules Bailey (*via email*)
Mr. Garrett Stephenson (*via email*)
Mr. K. C. Safley (*via email*)
Mr. Michael Connors (*via email*)
Mr. Michael Neff (*via email*)
Ms. Anna Slatinsky (*via email*)
Mr. Peter Livingston (*via email*)